Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL DeNARDO — PETITIONER

vs.

DIANE BARRANS, ET AL., — RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO

THE ALASKA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Daniel DeNardo
P.O. Box 100682
Anchorage, Alaska 99510

QUESTIONS PRESENTED

" ... but it is equally true that whether a Federal judgment has been given due force and effect in the state court is a Federal question reviewable by this court, which will determine for itself whether such judgment has been given due weight or otherwise."
Semtek v. Lockheed, 121 S.Ct. 1021, 1028 (2001)

1. Does the Alaska Supreme Court violate Semtek v. Lockheed, 121 S.Ct. 1021 (2001), under the Supremacy Clause when it dismisses a state court 42 U.S.C. § 1983 action because the Alaska Federal District Court dismissed the same concurrent 42 U.S.C. § 1983 action under Federal Civil Rule of Civil Procedure 41(b) because of petitioner's medical incapacity to prosecute the case?

2. Does Semtek v. Lockheed, 121 S.Ct. 1021 (2001), allow the Alaska Supreme Court to fashion its own federal common law

interpretation of Federal Rule of Civil Procedure 41(b) to give it res judicata preclusive effect in § 1983 actions filed concurrently in Alaska State Courts?

3. Does *Semtek* govern 42 U.S.C § 1983 actions filed concurrently in federal and state courts so as to prevent dismissal of the state § 1983 action when the federal § 1983 action is dismissed under Federal Rule of Civil Procedure 41(b) for failure to prosecute because of a medical disability?

LIST OF PARTIES

Diane Barrans

Teresa Williams

Mark Begich

Milton Byrd

Alaska Student Loan Corp.,

Alaska Commission on Postsecondary Education

Frank Love

Jan Ferrell

Burton Research

Sharon Burton

Karla Burton

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and has been published at 59 P.3d 266 (Alaska 2002).

JURISDICTION

The date on which the highest state court decided my case was 29 November 2002.

A copy of the decision appears at Appendix A.

CONSTITUTIONAL PROVISION RELIED ON

Supremacy Clause, Art. VI § 2

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

STATEMENT OF THE CASE

[Exc. is the Alaska Supreme Court Record]

The Alaska Postsecondary Education Commission (APEC) and the Alaska Student Loan Corp. hired Daniel DeNardo with the governor's office approval as an internal auditor because of a financial and management crises in the student loan program. [Exc. 1-14]

DeNardo passed his probationary and annual evaluations. [Exc. 16-19] Defendants ACPE and Diane Barrans terminated DeNardo's employment after he filed an Equal Employment Opportunity complaint and acted as a whistleblower by informing the chairman of ACPE about tens of millions of dollars in fraud and mismanagement-by defendants: 1) the Student Loan Corp. intentionally overcharged 24,000 student borrowers on the interest they owed on their loans; 2) millions of dollars in misappropriations; 3) licensing non-existent schools; 4) collection vendor overcharges in the hundreds of thousands; 5) internal personnel fraud in the hundreds of thousands. [Exc. 80-82, 124

DeNardo refuted the fraudulent and pretextual termination allegations with documentary evidence. [Exc. 21-79, 83-91, 94-95, 99-115, 117-123, 125]

Defendants forced the resignation of audit director Richard Lowry because he refused to commit accounting fraud and violate state statutes. A Department of Labor investigation confirmed Lowry's constructive discharge because Lowry refused to violate his fiduciary duties and state statutes. [Exc. 126-127]

Plaintiff filed a 42 U.S.C. § 1983 action in the Alaska Federal District Court in July 1997 for violations under the First, Fourth, and Fourteenth Amendments. [Exc. 92-93]

Eighteen months later in January 1999, Commissioner of Labor Ed Flanagan rejected defendants accusations in a decision exonerating DeNardo and former audit director Richard Lowry of any violations of Division of Unemployment Insurance statutes. [Exc. 126-127]

DeNardo filed his 42 U.S.C. §1983 action in Alaska State Superior Court concurrent with the same action filed in Alaska Federal Court.

Federal Rule 41(b) Dismissal in Federal Court

DeNardo filed a motion August 9, 1999 for a continuance of the federal court trial date because his doctor diagnosed him with a bleeding ulcer. DeNardo participated telephonically from Providence Hospital in the August 13, 1999 continuance hearing. [Exc. 116, 128, 130]

DeNardo's doctor preliminary diagnosed anemia which is a sign of internal bleeding and H pylori. [Exc. 128] Dr. Park stated she wanted to perform additional tests and begin treatment with broad spectrum antibiotics. DeNardo's Seattle physician Dr. Lou had not recommended H pylori treatment. [Exc. 116]

Learned treatises under Fed.R.Evid. 803(18) submitted under judicial notice find that broad spectrum treatment with Omeprazole is a ten to fourteen day program with a ninety plus percent healing rate: "Practice Guidelines, Medical Treatment of Peptic Ulcer Disease," formulated by the Practice Committee of the American College of Gastroenterology, published February 1996 in the

Journal of the American Medical Association; "Treatment Strategies for Helicobacter pylori Infection," American Family Physician, and "H pylori and Peptic Ulcer," National Institutes of Health. [Exc. 129] The practice parameters address treatment of Helicobacter pylori with antibiotic therapy, and recognize that in the last few years modern science has identified H pylori as the cause of a majority of ulcers. Treatment is a ten to fourteen day intensive antibiotic therapy with Omeprazole. [Exc. 129]

DeNardo testified under Fed.R.Evid. 803(3), declarant's present physical or mental condition, that he was not capable of attending trial on August 16, 1999 because of a bleeding ulcer and reliance on his doctor's advice. [Exc. 130 pp. 14, 15, 17, 19, 21-22] Under Fed.R.Evid. 803(4), statements for medical diagnosis or treatment, DeNardo stated he could not start the August 16 trial.

Under Fed.R.Evid. 701, opinion testimony of a lay witness, DeNardo testified he could not start the

trial on August 16 and needed a continuance. [Exc. 130 pp. 14, 17, 19, 21-22]

DeNardo's doctor prescribed Prilosec (omeprazole), which causes headache, diarrhea, abdominal pain, nausea, dizziness, and fatigue. [Exc. 129] DeNardo testified he was experiencing the contraindications. [Exc. 130, p.15]

DeNardo testified H Pylori treatment took ten to fourteen days and he could begin trial in three weeks. [Exc. 130, p.17]

Defendants did not cross examine DeNardo nor present any contrary evidence.

The Alaska Federal District Court denied the continuance and dismissed the § 1983 action under Federal Civil Rule 41(b) for failure to prosecute. [Exc. 130] The judge opined that DeNardo should have had the treatment in Seattle under Dr. Lou. The court ignored the fact Dr. Lou did not recommend H pylori treatment. [Exc. 116]

State Court Dismissal

The state superior court dismissed DeNardo's 42 U.S.C. § 1983 action on August 3, 2001 because of the res judicata preclusive effect of the Alaska Federal District Court's dismissal of petitioner's § 1983 action under Fed.R.Civ.P. 41(b).

November 29, 2002 the Alaska Supreme Court upheld the dismissal under *Semtek* because it reasoned *Semtec* allowed the state court to interpret federal common law to give res judicata preclusive effect to Fed.R.Civ.P. 41(b) dismissals against 42 U.S.C. § 1983 actions filed concurrently in state court.

Proceedings Where Federal Question Raised

Petitioner raised *Semtek v. Lockheed*, 121 S.Ct. 1021 (2001) in the Alaska Superior Court at summary judgment oral argument 18 May 2001 at which petitioner distributed copies of *Semtek*; and in the Alaska Supreme Court in petitioner's appellate brief with *Semtek* attached as an appendix and at oral argument May 2002.

The superior court ignored *Semtek v. Lockheed*, never mentioning the case. [Appendix B]

The Alaska Supreme Court based its decision on *Semtek*. [Appendix A]

REASONS FOR GRANTING THE PETITION

I. *Semtek v. Lockheed*, 121 S.Ct. 1021 (2001) Mandates The Non-Preclusive Effect Of Federal Rule of Civil Procedure 41(b) In Alaska State Courts

There is no diversity or state law issue in this case. The application of Federal Rule of Civil Procedure 41(b) in a federal cause of action under 42 U.S,C. § 1983 is the issue.

Semtek v. Lockheed, 121 S.Ct. 1021 (2001), under the Supremacy Clause Art. VI § 2 of the Constitution controls the interpretation of Federal Civil Rule of Procedure 41(b), Involuntary Dismissal: effect Thereof.

The United States Supreme Court's ratio decidendi in *Semtek* declared a dismissal under Federal Rule of Civil Procedure 41(b) is not res judicata, not on the merits, and does not preclude access to the state courts with concurrent jurisdiction to hear § 1983 actions:

"Finally, if Rule 41(b) did mean what respondent suggests, we would surely have relied upon it in our cases recognizing the claim-preclusive effect of federal judgments in federal question cases. Yet for over half a century since the promulgation of Rule 41(b), we have not once done so." Id. at 1026.

"We think, then, that the effect of the 'adjudication upon the merits' default provision of Rule 41(b) and presumably, of the explicit order in the present case that used the language of the default provision, is simply that, unlike a dismissal 'without prejudice,' the dismissal in the present case barred refilling of the same claim in the United District Court for the Central District of California. That is undoubtedly a necessary condition, but it is not a sufficient one, for claim preclusive effect in other courts." Id. at 1027.

Petitioner's 42 U.S.C. § 1983 action in state court is not precluded by the federal court's Federal Rule of Civil Procedure 41(b) dismissal because petitioner's medical condition precluded prosecuting the action in federal court.

The United States Supreme Court addressed the claim preclusive effect of a federal court judgment in a federal question case:

> "[w]e have long held that States cannot give those judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes. Id. at 1027. ... [b]ut it is equally true that whether a Federal judgment has been given due force and effect in the state court is a Federal question reviewable by this court, which will determine for itself whether such judgment has been given due weight or otherwise." Id. at 1028.

Under the Supremacy Clause this case is controlled by *Semtek v. Lockheed*, 121 S.Ct. 1021 (2001), and federal substantive law under 42 U.S.C. § 1983. *Howlett v. Rose*, 496 U.S. 356, 382-82 (1990).

II. Alaska Supreme Court Cannot Fashion Its Own Interpretation Of Federal Common Law To Defeat *Semtek v. Lockheed*

The Alaska Supreme Court determined that *Semtek* allowed it to fashion its own federal common law interpretation of Federal Rule of Civil Procedure 41(b):

> "To determine the claim preclusive effect of a punitive dismissal under Rule 41(b), then, *Semtek* requires us to look for an answer in federal common law, not Rule 41(b)." (emphasis added) [App. A-5]

> "In summary, then, *Semtek* requires us to determine the preclusive effect of DeNardo's Rule 41(b) dismissal by referring to federal common law." [App. A-7]

No page in *Semtek* is cited for this authority. The Alaska Supreme Court analyzed res judicata ignoring *Semtek's* ruling interpreting Federal Rule of Civil Procedure 41(b).

This is not a diversity case. There is no state law issue. *Semtek* must be applied in § 1983 actions under Federal Rule of Civil Procedure 41(b).

Semtek ruled under the Supremacy Clause that state courts do not have the authority to fashion their own federal common law interpretating Federal Rule of Civil Procedure 41(b):

> "It is also true, however, that no federal textual provision addresses the claim–preclusion effect of a federal–court judgment in a federal–question case, yet we have long held that States cannot give those judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes." *Semtek*, 121 S.Ct. at 1027.

> "The reasoning of that line of cases suggests, moreover, that even when States are allowed to give federal judgments (notably, judgments in diversity cases) no more than the effect accorded the state judgments, that disposition is by direction of *this* Court, which has the lase word on the claim–preclusive effect of *all* federal judgments." Id. at 1028

The United States Supreme Court in *Semtek* determined the federal common law interpretation of Rule 41(b) dismissals for failure to prosecute. There is no res judicata preclusive effect of a Federal Rule of Civil Procedure 41(b) dismissal of a § 1983 action requiring dismissal of the same § 1983 action filed concurrently in state court.

III. *Semtek* Governs Rule 41(b) Dismissals Of 42 U.S.C. § 1983 Actions By Federal Courts Prohibiting Dismissal Of Same Concurrently Filed § 1983 Action In State Court

28 U.S.C. § 1332 jurisdiction pertains to diversity cases. 28 U.S.C §§ 1331 and 1343 confer jurisdiction for § 1983 actions. There is no additional state law question in this case.

State courts have concurrent jurisdiction to hear 42 U.S.C. § 1983 actions. *Patsy v. Board of Regents*, 457 U.S. 496, 506-07 (1982); *Maine v. Thiboutot*, 448 U.S. 1, 3 (1980).

Petitioner's action under 42 U.S.C. §1983 and §1988 is governed by federal substantive law. *City of Sitka v. Swanner*, 649 P.2d 940, 946 (Alaska 1982); *Balough v. Fairbanks North Star Borough*, 995 P.2d 245 (Alaska 2000); *Lyman v. State*, 824 P.2d 703, 707 (Alaska 1992).

Federal rights cannot be defeated by forms of local practice when state courts entertain a federally created cause of action. *Felder v. Casey*, 487 U.S. 131, 138 (1988). In this case the Alaska Courts cannot

violate *Semtek* under the Supremacy Clause to deny a federal cause of action.

Semtek controls the federal common law interpretation and application of Federal Rule of Civil Procedure 41(b) in Alaska Courts. Petitioner is not precluded from pursuing his concurrent 42 U.S.C. § 1983 action in Alaska State Courts.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Daniel DeNardo

Daniel DeNardo

Date: 24 April 2003

THE SUPREME COURT OF THE STATE OF ALASKA

DANIEL DeNARDO, Supreme Court No. S-10292
Appellant,
v. OPINION
DIANE BARRANS, et al. [No.5647 November 29, 2002]
Appellees.

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Stephanie Joannides, Judge

Before Fabe, Chief Justice, Matthews, Eastaugh, Bryner, and Carpeneti, Justices.

BRYNER, Justice

I. INTRODUCTION

Daniel DeNardo filed a superior court action for damages arising out of his allegedly wrongful termination from state employment. The superior court dismissed his case, ruling that is was barred under the doctrine of res judicata by a prior judgment on a nearly identical federal claim, which the federal court had dismissed "with prejudice" under Federal

Civil Rule 41(b) as a result of DeNardo's willful refusal to comply with a calendaring order. The primary question on appeal is whether claim preclusive effect attaches to the federal dismissal. Because we conclude that federal law requires us to give claim-preclusive effect to a punitive dismissal entered on the merits by a federal court under Rule 41(b), we affirm the superior court's judgment.

II. FACTS AND PROCEEDINGS

After being fired as an auditor for the Alaska Commission on Postsecondary Education, Daniel Eduardo filed an action form damages in the United States District Court for the District of Alaska against nine state employees, claiming that various actions they had taken against him in the course and scope of their employment resulted in his wrongful termination and deprived him of his constitutional rights. The district court entered a summary judgment order dismissing "with prejudice" DeNardo's claims against all defendants except Diane Barrans, his supervisor. [1] Several days before trial on the claims against Barrans,

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[1] The Ninth Circuit of Appeals summarily affirmed the dismissal in DeNardo v. Barrens, 230 F.3d 1366(9th Cir. 2000) (unpublished)

DeNardo asked for a continuance for medical reasons. When the court denied his request and directed him to proceed with trial on the date scheduled, Eduardo stated that he did not intend to appear as directed. In response, the district court dismissed DeNardo's case for "failure to abide by the orders of the court specifying that the dismissal would be "with prejudice." [2]

DeNardo then filed a nearly identical complaint in the Alaska superior court, naming as additional defendants two state agencies, the Alaska Commission on Postsecondary Education and the Alaska Student Loan Corporation.[3] The defendants moved for summary judgment, arguing that DeNardo's claims were barred by res judicata. Superior Court Judge Joannides granted the motion, ruling that DeNardo's complaint raised claims that the federal court had already resolved. DeNardo appeals.

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[2] The Ninth Circuit of Appeals summarily affirmed the dismissal in DeNardo v. Barrens, 238 F.3d 428 (9th Cir. 2000)(unpublished).
[3] Several of the defendants named in the state complaint are different from that name d in the federal complaint, but those differences are irrelevant.

III. DISCUSSION

In challenging the superior court's summary judgment order, DeNardo emphasizes that the doctrine of res judicata can apply only when a previous judgment has resolved the same claim "on the merits." [4] He argues that the federal district court's judgment dismissing his prior complaint does not qualify as a judgment "on the merits" because the dismissal was entered under Federal Civil Rule 41(b).[5] Although this rule expressly specifies that a dismissal under its provisions "operates as an adjudication upon the merits" unless the court specifically states otherwise in its dismissal order, DeNardo nonetheless cites the United States Supreme Court's recent

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[4] For example we recently stated: The doctrine of res judicata provides that a judgment in a prior action will bar a subsequent action if the prior judgment was (1) a final judgment on the merits, (2) from a court of competent jurisdiction, (3) in a dispute between the same parties(or their privies) about the same cause of action. Sengupta v. Univ. of Alaska, 21 P.3d 1240, 1251 (Alaska 2001), cert denied, 122 S.Ct. 1081(2002) (mem.).

[5] Federal Rule of Civil Procedure 41(b) provides, in relevant part: Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits.

decision in *Semtek International, Inc. v. Lockheed Martin Corp.*[6] as holding that Rule 41(b) dismissals do not qualify as judgments "on the merits" under the doctrine of res judicata.

But DeNardo's argument is unpersuasive. Preliminarily, we not that DeNardo's federal claims against all the defendants other than Barrans were dismissed with prejudice by summary judgment for failure to establish a prima facie case. This dismissal was unrelated to the subsequent Rule 41(b) dismissal of DeNardo's claims against Barrans, and because an order dismissing a claim for failure to establish a prima facie case necessarily passes on the substance of that claim, the federal court's order dismissing DeNardo's case against all defendants other than Barrens qualified as a judgment "on the merits" triggering res judicata preclusive effect.[7] The federal

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[6] 531 U.S. 497 (2001).

[7] See id. At 501-02 ("[A]n 'on the merits' adjudication is one that actually passes directly on the substance of [a particular] claim before the court.") (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 19 (1982).

court's summary judgment order thus barred DeNardo from relit gating his claims against all individual defendants other than Barrans, regardless of whether the subsequent Rule 41(b) dismissal had claim-preclusive effect.

As to the federal claims against Barrans, DeNardo's argument based on *Semtek* is unpersuasive because it misconstrues the decision and overstates *Semtek*'s significance in determining a punitive dismissal's preclusive effect. Although DeNardo insists that *Semtek* stands for the proposition "that dismissals pursuant to [FRCP 41(b)] are not 'on the merits' and have never had res judicata effect," its holding is considerably narrower.

In construing Rule 41(b)'s default provision, which specifies that a dismissal under the rule's terms "operates as an adjudication upon the merits" unless the order of dismissal specifies otherwise, *Semtek* began by observing that "[t]he original connotation of 'an on the merits' adjudication" — the connotation traditionally used to determine a judgment's preclusive effect—"is one that actually 'passes directly on the substance of a particular] claim' before the

court."[8] But *Semtek* held that the rule's use of the phrase has a narrower meaning: "[T]he effect of the 'adjudication upon the merits' default provision of Rule 41(b) ...is simply that, unlike a dismissal 'without prejudice,' the dismissal in the present case barred refilling of the same claim in the [same court]."[9]

Having adopted this interpretation, however, *Semtek* did not go on to conclude — as DeNardo insists it did — that Rule 41(b) dismissals can never have preclusive effect as judgments "on the merits" in the traditional sense. Instead, *Semtek* recognized that Rule 41(b) simply does not address the issue. Noting that a judgment "upon the merits" under Rule 41(b) "is undoubtedly a necessary condition, but it is not a sufficient one, for claim-preclusive effect in other courts,"[10] the Court in *Semtek* found it necessary to search elsewhere to determine the issue: "Having concluded that the claim-preclusive effect ... [of the federal judgment at issue] is dictated neither by *Dupasseur v. Rochereau*, as petitioner contends, nor

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[8] Id. (quoting RESTATEMENT §19 cmt. a).
[9] Id. At 506.
[10] Id.

by Rule 41(b), as respondent contends, we turn to consideration of what determines the issue."[11]

After considering the issue, *Semtek* concluded that federal common law determines a federal dismissal's preclusive effect in both federal-question and diversity cases.[12] Regarding federal question dismissals, the Court in *Semtek* emphasized that "no federal textual provision addresses the claim-preclusive effect of a federal-court judgment in a federal-question case, yet we have long held that States cannot give those judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes."[13] To determine the claim preclusive effect of a punitive dismissal under Rule 41(b), then, *Semtek* requires us to look for an answer in federal common law, not Rule 41(b). And federal case law provides a clear answer, holding that, unless the dismissing court otherwise specifies, a Rule 41(b) dismissal for failure to comply with a court order is "on the merits" in the traditional sense and must be given preclusive effect:

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[11] Id.
[12] Id. At 507-08.
[13] Id. at 507.

> All of the dismissals enumerated in Rule 41(b) which operated as adjudications on the merits —failure of the plaintiff to prosecute, or to comply with the Rules of Civil Procedure, or to comply with an order of the Court, or to present evidence showing a right to the relief on the facts and the law — primarily involve situations in which the defendant must incur the inconvenience of preparing to meet the merits because there is no initial bar to the Court's reaching them. It is therefore logical that a dismissal on one of these grounds should, unless the Court otherwise specifies, bar a subsequent action.[14]

WRIGHT, MILLER & COOPER amplifies this reasoning, describing the unique characteristics of "penalty dismissals" that justify giving them a preclusive effect:

> Rule 41(b) provides that unless the court in its order for dismissal otherwise provides, dismissals for failure to prosecute, to comply with the civil rules, or to comply with any order

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[14] *Costello v. U.S.*, 365 U.S. 265, 286-87 (1961).

> of court operate as an adjudication on the merits. The purpose of this provision is to establish a strong sanction to enforce compliance with proper procedure. Quite apart from Rule 41(b), this purpose of itself would suggest that penalty dismissals often should preclude a second action on the same claim.[15]

And *Semtek* itself makes the same point. The specific question at issue in *Semtek* was the preclusive effect of a federal judgment that dismissed a diversity claim on statute-of-limitations grounds under Rule 41(b).[16] Applying its common law power to decide the issue, the Court fashioned federal rule for diversity cases that ordinarily would incorporate the claim-preclusive law of the state whose substantive law is at issue.[17] But the Court took pains to warn that it might deviate fro this rule if the state law at issue refused to give claim-preclusive effect to a punitive dismissal:

> This federal reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests.

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[15] 18A WRIGHT, MILLER, FEDERAL PRACTICE AND PROCEDURE § 4440 (2d ed.. 2002)

[16] See *Semtek*, 531 U.S. at 499.

[17] See id. at 508.

> If, for example, state law did not accord claim-preclusive effect to dismissals for willful violation of discovery orders, federal courts' interest in the integrity of their own processes might justify a contrary federal rule.[18]

In summary, then, *Semtek* requires us to determine the preclusive effect of DeNardo's Rule 41(b) dismissal by referring to federal common law. Because federal cases unequivocally treat a punitive dismissal like DeNardo's – a judgment that terminates a case for a failing to follow court orders – as a judgment "on the merits" that has claim-preclusive effect, we hold that the federal court judgment dismissing DeNardo's claim against Barrans had the effect of precluding his subsequent state action against Barrans, which asserted the same claim.

So far, our decision precluded DeNardo from pursuing his state claims only against the individual defendants that he named in his superior court complaint.[19] We have not yet considered his state claims against newly named agencies, the Alaska

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[18] Id. at 509.

[19] We include in this category individual defendants newly named in DeNardo's state claim.

Commission on Postsecondary Education and the Alaska Student Loan Corporation. DeNardo asserts that, because federal law barred him from naming these agencies as defendants in his federal court action, the superior court erred in concluding that res judicata precluded him from suing them in state court.

Yet res judicata can bind parties who did not participate in the prior action: the doctrine holds that a properly entered judgment "should be conclusive upon the parties and those in privity with them."[20] Because the commission and the corporation are governmental entities, their liability could only be established vicariously, through proof that their officers and employees (the individual defendants named in DeNardo's complaint) acted wrongfully.[21] Under these circumstances, privity arises between the agency defendants, who had not been sued in federal court, and the individual defendants, all of whom were sued for actions taken in the course of their employment because their relationship is "such that one of them is vicariously responsible for the conduct

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[20] *Pennington v. Snow*, 471 P.2d 370, 374 (Alaska 1970).
[21] See *City of North Pole v. Zabek*, 934 P.2d 1292, 1300 (Alaska 1997).

of the other."[22] It follows that, by precluding DeNardo's individual claims, we also must preclude his agency claims.

IV. CONCLUSION

We therefore AFFIRM the superior court's judgment of dismissal.

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[22] See *Alaska Foods v. Nichiro Gyogyo Kaisha, Ltd.*, 768 P.2d 117, 121 (Alaska 1989).

IN THE SUPERIOR COURT FOR THE STATE ALASKA
THIRD JUDICIAL DISTRICT

Daniel DeNardo,
Plaintiff,
v.
Diane Barrans et al.,
Defendants.

Filed In The Trial Courts
August 3, 2001

Case No. 3AN-99-7673

ORDER GRANTING DEFENDNATS'
MOTION FOR SUMMARY JUDGMENT

Plaintiff's suit arises from associated claims of wrongful discharge. Defendants moved for summary judgment under the doctrine of res judicata since plaintiff's claims against the defendants have been dismissed by the U.S. District Court of Alaska. In opposition, plaintiff Daniel DeNardo, argues that the U.S. District Court did not hear the merits of his claim of defamation.

"Res judicata, or claim preclusion, implements the generally recognized public policy that there must by some end to litigation and that when one appears in court to present his case, it is fully

heard and the contested issue is decided against him, he may not later renew the litigation in another court.'"[23] The doctrine of res judicata provides that a final judgment in a prior action bars a subsequent action if the prior judgment was (1) a final judgment on the merits; (2) from a court of competent jurisdiction, (3) in a dispute between the same parties about the same cause of action.[24] "When deciding whether two claims are part of the same cause of action, [the court looks] to the transaction out of which the claims arose, not to the legal theories asserted.[25] "What factual grouping constitutes a 'transaction' is determined by 'whether the facts are related in time, space, origin, or motivation,' and 'whether they form a convenient trial unit.'"[26] "After entry of a judgment on the merits of a controversy, res judicata bars subsequent actions between the same parties on the same claim, or on claims that the

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[23] *Alaska Contracting & Consulting v. Dept. Labor*, 8 P.3d 340,344(Alaska 2000)
[24] *Plumber v. Univ. of Alaska*, 936 P.2d 163 (Alaska 1997)
[25] *Tope v. Christianson*, 959 P.2d 1240,1244 (Alaska 1998)
[26] Id. at 1244.

parties were required to bring in the original action."[27]

On August 21, 2000, the 9th Circuit affirmed the U.S. District Court's dismissal of plaintiff's 42 U.S.C. § 1983 claim, noting that Mr. DeNardo had failed to state a claim upon which relief could be granted.[28] On September 26, 2000 the Ninth Circuit affirmed the District Court's dismissal with prejudice of DeNardo's retaliatory dismissal claim against Barrens, noting the district court had not abused its discretion when it first denied DeNardo's motion for a continuance of the trial date, and then dismissed DeNardo's complaint after DeNardo informed the court that he would not appear at trial as scheduled.[29]

At oral arguments, DeNardo argued that the defamation claim was a separate action which survived the final judgments entered by the U.S. District Court. DeNardo claims defendants made defamatory references about him in an administrative decision and in statements during defendants' appeal of a determination relating to an unrelated party's

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[27] *Alaska Contracting & Consulting v. Alaska Dept .of Labor*, 8 P.3d 340,344 (Alaska 2000)
[28] *DeNardo v. Barrans*, 230 F.3d 1366.
[29] *DeNardo v. Barrans*, 238 F.3d 428.

unemployment benefit action. However, the Ninth Circuit ruled that DeNardo failed to state a claim upon which relief could be granted in those allegations of defamation and dismissed his claim.[30]

A dismissal for failure to state a claim for which relief may be granted is granted when there are no merits to a claim. In federal court, dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a "judgment on the merits."[31] Thus the federal court's dismissal is a final judgment on the merits as to the defamation claim.

Federal Rule of Civil Procedure 41(b) provides that when a plaintiff fails "to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant" and that a dismissal under Federal Rule of Civil Procedure 41(b) "operates as an adjudication upon the merits." Mr. DeNardo informed the U.S. District Court he did not intend to comply with the federal court's order to proceed to trial. The District Court dismissed the 42 U.S.C. §1983 claim of

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[30] *DeNardo v. Barrans*, 230 F.3d 1366.
[31] *Federated Dept. Stores v. Moitie*, 452 U.S. 394,399.

retaliatory dismissal, with prejudice, and the Ninth Circuit affirmed.[32]

The U.S. District Court as a court of competent jurisdiction, entered final judgments on the same claims as those presented in this case, and the Ninth Circuit Court of Appeals affirmed those judgments. The dispute in the case at bar is between the same parties about the same cause of action. The claim is related in time, space, origin or motivation, and would have formed a convenient trial unit. Plaintiff's claims in this court are therefore barred by the doctrine of res judicata.

Defendants' motion for summary judgment is granted.

Dated 3 August 2001.

"s/_____".
Stephanie Joannides
Superior Court Judge

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[32] *DeNardo v. Barrans*, 238 F.3d 428.